United States Court of Appeals

for the Second Circuit

APPENDIX

Original copy w/ affidavit of mailing

74-2266

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2266

UNITED STATES OF AMERICA,

Appellant,

—against—

ANDREW FUREY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

DOCKET ENTRIES A 1

73 CR 608

DOOLING, J.

CRIMINAL DOCKET

CLOSED

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: D. DePetrid
vs.	
ANDREW FUREY	
	For Defendant:

..is possess with intent to distribute narcotics.

ABSTRACT OF COSTS	AMOUNT	DATE	NAME	RECEIVED	DI
Fine,		[illegible]	[illegible]	5 -	
Clerk,		[illegible]	[illegible]		
Marshal,		9-11-74	Govt's notice of appeal		
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
6/21/73	Information filed.
6/21/73	Before JUDD, J. - Deft present with counsel-Deft signs form agreei
	be treated as a juvenile offender.
11/27/73	Magistrate's file 73M243 and 72M51 inserted into criminal file
	73CR608
12-13-73	Before BARTELS, J. - Case called- Deft and counsel John Dwyer pres
	Deft moves to dismiss on the grounds that it has been over 6 mon
	Decision reserved- Motion to be submitted in writing- Case adjd
	12-20-73 at 4:30 P.M. for motion

12-[illegible]-73	Notice of motion to dismiss the indictment, inspection, etc. filed
[illegible]-73	Memorandum of Law of deft filed.
[illegible]-73	Notice of Appearance for Deft filed.
12/[illegible]/73	Before DOOLING,J.- Case called- Deft and counsel present-Conference held and adjd to 12/21/73 for hearing
12/[illegible]/73	Before DOOLING,J.- Case called- Deft and counsel present-Deft after being advised of his rights consents to being tried as a juvenile delinquent-Hearing Ordered and begun-Both sides rest-Decision reserved.
[illegible]-73	By DOOLING,J.- Memorandum and Order filed that motion for an order dismissing the juvenile proceedings is denied- And that alternative motio to produce for inspection certain documents is denied, etc.
[illegible]-74	Attorney's Affirmation filed
[illegible]	Notice of motion for stay of brief presently scheduled for 1-2-73 filed, (motion dated 12-31-73)
[illegible]	By DOOLING,J.- Order filed that motion for a stay is denied and that t will convene at 2:00 P.M. on 1-2-74
-73	Before DOOLING,J.- Case called- Deft juvenile and counsel present- Deft juvenile moves to suppress letter, etc.- Hearing ordered and begun on motion to suppress- Ordered and begun- Hearing contd to 1-3-74
-3-74	Before DOOLING J - Case called - deft Juvenile & counsel R. Mooney present - Hearing resumed - Govt rests - Motion to suppress is denied - Parties stipulate that record of suppression hearing to constitute the record of adjudication - hearing concluded - Findings on the record Court finds that the delinquency charge was committed by the deft and t he is a juvenile delinquent - bail continued - sentence adjd without da
-21-74	Judgment received from the Court of Appeals filed -Ordered that a stay pending determination of said petition be denied. In view of this ruli the petition is dismissed as moot.
-1-74	Before Dooling J - case called - adjd to 3-8-74 (sentence of Andrew Fu
-8-74	Before DOOLING,J.- Case called- Deft and counsel- On the finding that t deft is a juvenile delinquent he is committed until he reaches the age 21(deft advised of his right to appeal)- The deft will be released purs to the provisions of T-18, U.S.C. Sec. 3148 and 3146(a)(4) upon the exe of a surety bond of $5,000.00 provided that the notice of appeal be fil today and the case be brought on for hearing in the U.S. C of A on the earliest possible date set by that court on prompt application to the court for a hearing date

Judgment and Commitment filed- certified copies to Marshal

Notice of appeal filed

Docket entries and duplicate of notice of appeal mailed to court of appeal

3 stenographers transcripts filed dated Jan. 3 and Mar 8, 1974 re

/74	Stenographer's transcript of 6/21/73 filed.
-74	Record on Appeal certified and mailed to the Court of Appeals.
-74	Acknowledgment received from court of appeals for receipt of record on appeal
8-74	Magistrate's file 74 M 361 inserted into CR file.
-74	2 volumes of stenographic transcripts filed (pgs 1 to 150)
/74	Supplemental Index on Appeal certified and mailed to the Court of Appeals filed.
26-74	Acknowledgment received from the Court of Appeals for receipt of supplemental index to record.
6-74	Copy of letter to James Furey from A.U.S.A. DeBetts dated 7-1[illegible] re: confirmation of hearing on 7/23/74 @ 10:30
1-74	Stenographers transcript filed dated Dec. 13,1973.
1-74	Copy of Opinion and certified copy of Judgment received from the Court of Appeals filed remanding case to the District Court for further proceedings, etc. (VR)
6-74	Stenographers transcript filed dated July 23, 1974.
-74	2 letters filed received from Chambers (one dated July 30, 1974 and one dated August 1, 1974)
-19-74	Letter dated Aug. 15, 1974 received from Chambers filed re deft from James M. Furey, Esq.
26-74	By DOOLING J - Memorandum and Order filed dismissing the Information pursuant to Rule 48(b)
1-74	Govt's notice of appeal filed
-74	Docket entries and duplicate of notice of appeal mailed to court of appeals
24-74	Record on appeal certified and mailed to court of appeals

JB:DAD:om
#725,647

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

ANDREW FUREY,

Defendant.

INFORMATION

Cr. No. _____
(18, U.S.C., §5031, Fed. Juv. Del. Act)

- - - - - - - - - - - - - - - - - - - X

THE UNITED STATES ATTORNEY CHARGES:

ANDREW FUREY

is a juvenile delinquent within the statutes of the United States and particularly the Juvenile Delinquency Act, in that on or about the 19th day of December 1972, within the Eastern District of New York, he did knowingly and intentionally possess with intent to distribute approximately one and one-quarter (1-1/4) pounds of opium, a Schedule II narcotic drug controlled substance in violation of Title 21, U.S.C., §841(a)(1).

(Title 18, United States Code, Section 5031, Federal Juvenile Delinquency Act.)

_____
UNITED STATES ATTORNEY

I, ANDREW FURLY, the above-named juvenile, having been duly apprised of my Constitutional rights and the consent and penalty provisions of the Federal Juvenile Delinquency Act, do hereby consent that the UNITED STATES OF AMERICA, by ROBERT A. MORSE, United States Attorney for the Eastern District of New York, proceed against me as a juvenile delinquent pursuant to the provisions of the Federal Juvenile Delinquency Act.

Dated: Brooklyn, New York
June , 1973

ANDREW FURLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA :

- against - :

ANDREW FUREY, :

Defendant. :

- X

73-C-608

MEMORANDUM and ORDER

APPEARANCES:

RONALD DE PETRIS, ESQ. (Edward J.Boyd, V, Esq., United States Attorney, of Counsel) for the Government.

RICHARD C. MOONEY, ESQ. (Messrs. Furey and Mooney, of Counsel) for Defendant.

DOOLING, D.J.

Defendant--juvenile moves to dismiss the proceeding for failure to bring the case to trial within six months of the arrest of the juvenile.

On December 19, 1972, the defendant was arrested at his residence and on the same day was charged in a complaint signed by Joseph Corcoran, a special agent of the United States Bureau of Customs, with possessing with intent to

distribute about one and one-quarter pounds of opium, a Schedule II narcotic drug controlled substance in violation of 21 U.S.C. § 841(a)(1). The offense of § 841(a)(1) is a felony punishable by a fine not in excess of $25,000.00 and imprisonment for a term not in excess of 15 years, plus, in any case in which a sentence of imprisonment is imposed under the section, a special additional parole term of not less than 3 years. Defendant was on the same day arraigned before Magistrate Brisach and was at first held to $10,000.00 bail to be furnished in the form of a surety bond, a bail amount reduced apparently on the following day to $5,000.00 to be given in the form of a surety bond. The defendant was released on that day or a day later upon giving the surety bond.

The hearing evidence is clear that the Assistant United States Attorney was soon in touch with the defendant's uncle, James Furey, who is a lawyer, whose practice consists primarily of the trial of civil actions, but who also has had experience in trial in the state courts of criminal actions. Mr. James Furey had at the time no acquaintance with the provisions of the Federal Juvenile Delinquency Act, and it

soon appeared that the defendant was a juvenile. Defendant was born on April 23, 1955.

What occurred between the date of arraignment and the date, June 21, 1973, when the information was filed upon the juvenile's consent is, most unfortunately, a matter of dispute. However, it is clear that it was made apparent that there were two ways of proceeding, first, proceeding against the defendant as an adult offender, which as a matter of law would require an express direction of the Attorney General (as distinguished from the United States Attorney), and, second, procedure against the defendant as a juvenile delinquent, which would require the consent of the defendant. The recollection of the Assistant United States Attorney is that the matter of which way to proceed was submitted to Washington, and the recollection of defense counsel is that, explicitly or implicitly, the Assistant United States Attorney gave defense counsel the impression that the Assistant United States Attorney was seeking authorization to proceed against the defendant as an adult.

In any event, it appears that it was not until February or early March that the matter of which way the

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Government would propose to proceed had been cleared with Washington; the determination was that the Attorney General would not direct procedure by an indictment if the defendant assented to juvenile procedure.

Again in this period, there may have been limited contact between counsel, and, again, their recollections are at variance. The Assistant United States Attorney's recollection is that he definitely got the impression that the proceeding would not be contested; counsel for the defense have the very different recollection that the United States Attorney would not accept a plea of any kind except guilty as charged. The Assistant United States Attorney's recollection is that he outlined the normal juvenile procedure in the district, which tends to obliterate the distinction between contested and uncontested juvenile proceedings since even where the juvenile and counsel indicate that there will not be a contest, a hearing is conducted to make sure, through an evidentiary showing, that the juvenile did in fact transgress the law. Defense counsel insists that he did not learn of these matters until December.

FPI—SS—3-17-72—50M—9153

In any event on or about June 18, 1973, the Assistant United States Attorney sent a letter to defense counsel to the effect that the matter would be on for consent to proceed against the defendant as a juvenile on June 21, 1973, before the Honorable Orrin G. Judd. The practice under the Individual Assignment and Calendar Rules of the Eastern District is that the Miscellaneous Judge conducts juvenile consent procedures under 18 U.S.C. § 5033 and then keeps the case as assigned judge. See Rule 5(a)(10). Defense counsel insists that the letter of June 18, 1973, was the only notice he ever had of what was forthcoming, although such a letter might seem to presuppose enough earlier discussion to warrant the Assistant's expectation that there would be a consent. On the 21st of June the consent proceedings took place before Judge Judd. The information charging juvenile delinquency was filed on June 21 and to it was appended the defendant's consent to juvenile procedure.

The rule of the Eastern District is clear that juvenile cases must go before the Miscellaneous Judge for the execution of consent and the filing of the information which thereupon initiates the case and that, by exception,

the juvenile cases are not randomly assigned as are all other cases but remain with the judge who supervised the taking of the consent; the general theory is that the importance of the consent procedure counsels the advisability of having the same judge continue with the case throughout. For some inexplicable reason the case was not assigned to Judge Judd and exactly when it was randomly assigned is not clear. It was, however, before September 1, 1973, assigned to the undersigned.

For whatever reason, no Notice of Readiness was filed by the United States Attorney and the case was not called up for action by the undersigned. However, in October of 1973 the Assistant United States Attorney inquired of the undersigned about the status of the case, and an initial conference date satisfactory to counsel was set up for December 13th. On that date the defendant announced, and on December 14th filed, the present motion to dismiss for failure to comply with the rules respecting prompt disposition (Rule 50, and Plan for Achieving Prompt Disposition of Criminal Cases).

The Assistant United States Attorney has stated, and there is no reason to doubt, that the Government has at all

times been ready for trial. The case appears to be one presenting no particular trial problems from the Government's point of view, its witnesses are available, and no trial problems have at any time been anticipated. There would be considerable difficulty here in finding that there was an adequate communication of explicit notice to the district judge that the case was ready for trial, and the omission to employ the usual form of Notice of Readiness leaves it quite uncertain whether that was done within six months after the Attorney General advised that he would not require that the defendant be proceeded against as an adult. However, the confusion over the assignment of the case away from the judge who took the consent in part excuses the failure of formal procedures, and an additional circumstance is that, again, there is no reason to doubt that the Assistant United States Attorney believed that there would not be a consent even though the defense counsel believed that the Government was unprepared to make any concessions and was requiring a plea of guilty and that, therefore, the case would have to be tried in a full dress way. Such a misunderstanding is quite possible since, as the Assistant United States Attorney has pointed out as a witness in the case, it is

difficult to tell whether a juvenile case is proceeding without contest or not; there is always an evidentiary hearing, the juvenile is always represented by counsel, and there is always some interrogation by defense counsel. There is, again, ground for misunderstanding since the general federal practice, at least in the Eastern District, leaves no genuine room for negotiation over the disposition of a juvenile case. The very nature of a juvenile proceeding leaves nothing to negotiate about. 18 U.S.C. § 5034 does not distinguish underlying offenses; in a sense every juvenile case is identical whether the underlying charge is one, as in the present case, in which a fearful sentence may be imposed, or one (e.g., a Dyer Act charge) in which a fairly limited sentence is the maximum sentence possible in the case of an adult.

No purposive delay by the Government has occurred. Inadvertence and administrative confusion compounded by clerical omissions on the parts of the Assistant United States Attorney, the undersigned and the Clerk's office have caused the delay. No advantage has accrued to the Government certainly from the delay. Marked advantage has accrued to the defendant, who, if found to be a delinquent cannot be

committed beyond his 21st birthday; each moment of delay in hearing reduces the maximum term of the juvenile's commitment or probation.

The case is one in which, if it is within Rule 4 of the Plan, falls into the class of cases in which the six months limitation period would be extended because the delay has been occasioned by exceptional circumstances within the idea of Rule 5(h).

However, June 21st, 1973, is the base-line date for this case. On that date for the first time the defendant was charged as a juvenile delinquent. The notice of readiness was filed on December 21, 1973, and on December 13, 1973, the Government unequivocally advised defendant and the Court that it was ready and willing and anxious to proceed. At the hearing of the motion on the late afternoon of December 20th, the Court advised counsel that the juvenile proceeding could be heard either in the days immediately following Christmas or in the days immediately following New Years da . Defense counsel chose the latter date, reserving their protest against the conduct of any proceedings in the case. The case will, therefore, be heard on January 2, 1974, on the basis that the Government was ready within six months of June 21,

1973 and that the case was set down for a hearing before the expiration of the six month period and in effect on the first open date acceptable to defense counsel.

Under 18 U.S.C. §§ 5031 and following, a juvenile's commission of an act in violation of the law of the United States (other than a capital offense) is juvenile delinquency. It is not either a misdemeanor or a felony. Juvenile delinquency admits of no degrees and of no differences in the kind of rehabilitational or penological treatment that follows upon a determination that a juvenile is a delinquent. For example, In Ivan V. v. City of New York, 1972, 407 U.S. 203, the Court spoke of " . . . the essentials of due process and fair treatment that must be afforded at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult (underscoring supplied)." As the Court pointed out in McKeiver v. Pennsylvania, 1971, 403 U.S. 528, 541, juvenile proceedings are sui generis, neither criminal nor civil in their full implications, and the juvenile is not constitutionally entitled to a jury trial.

In the present case the felony complaint upon which the defendant was arrested has completely lapsed. No indictment followed upon it. Once the defendant, by his consent, permitted the juvenile proceedings to go forward, the risk of indictment for the felony, and exposure to the fearful punishment that attaches to it, were totally removed. The felony charge was disposed of on June 21st, and a new and very different case addressed to a different aim was then initiated.

Accordingly, it is

ORDERED that the motion for an order dismissing juvenile proceedings for failure to bring it earlier to trial is in all respects denied, and the alternative motion, for an order requiring the Government to produce for inspection and copying certain documents allegedly taken from the defendant's home, is denied as having become moot through the production of the material on request at the hearing on December 20, 1973.

Brooklyn, New York
December 27, 1973

John F. Dooling, Jr.
U. S. District Judge

DECISION OF THE COURT OF APPEALS

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Da

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1098—September Term, 1973.

(Argued June 5, 1974 Decided July 2, 1974.)

Docket No. 74-1410

UNITED STATES OF AMERICA,

Appellee,

—against—

ANDREW FUREY,

Appellant.

Before:

KAUFMAN, *Chief Judge,*
MANSFIELD and MULLIGAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* finding appellant to be a juvenile delinquent in violation of 18 U.S.C. § 5031.

Judgment vacated and case remanded with instructions.

PAUL B. BERGMAN, Assistant United States Attorney (David G. Trager, United States Attorney, Eastern District of New York, Raymond J. Dearie, David A. DePetris, Assistant United States Attorneys, of Counsel), *for Appellee.*

JAMES M. FUREY, Hempstead, New York (Furey & Mooney, on the brief), *for Appellant.*

MULLIGAN, *Circuit Judge:*

Andrew Furey appeals from a judgment entered in the United States District Court for the Eastern District of New York on March 8, 1974, following a non-jury trial before Hon. John F. Dooling, Jr., finding appellant to be a juvenile delinquent in violation of 18 U.S.C. § 5031 and committing him in accordance with 18 U.S.C. § 5034 to the custody of the Attorney General until he reaches the age of 21. The judgment is based upon an information charging that Furey possessed with intent to distribute about 1¼ pounds of opium in violation of 21 U.S.C. § 841(a)(1).

During a routine examination of incoming overseas mail, inspectors discovered the presence of opium in a 1¼ pound package which was addressed to the appellant Andrew Furey. On December 19, 1972, the package was duly delivered to Furey's home under controlled conditions by a regular letter carrier of the U.S. Postal Service. Shortly thereafter, while two of the surveilling agents were entering appellant's home through the front door, a third agent observed someone throwing a parcel from a back window of an upstairs bedroom, the same room in which the appellant was apprehended by the other agents. The parcel consisted of one slab of opium and another of hashish, wrapped in plastic.

Furey does not complain on this appeal about the seizure of these drugs, but rather contends that the district court erred in failing to suppress certain letters taken from a bureau in his bedroom. The argument is frivolous in view of the substantial evidence to support the district court's findings that the agents reasonably believed that the drugs thrown from the window did not comprise all the drugs which had been delivered to Furey's home and that the search of his bureau did not take place until after the

agents had procured a warrant and had further obtained the consent of Furey's mother to search the premises.

Furey's other argument on appeal, however, is more substantial. Furey urges that the district court erred in denying his motion to dismiss, which was based on the ground that the Government was not ready for trial within the time prescribed by the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases (the Plan).[1] Under Rule 4[2] of the Plan "the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be

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1 The Plan, which, in accordance with Fed. R. Crim. P. 50(b), was adopted by the judges of the United States District Court for the Eastern District of New York and approved by the Judicial Council, became effective on April 1, 1973 and therefore governs the disposition of this case. See *Hilbert* v. *Dooling*, 476 F.2d 355, 356 n.2 (2d Cir.) (*en banc*), cert. denied, 414 U.S. 878 (1973). The Eastern District's Plan, like that of the Southern District, adopted many of the provisions of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (which were superseded by the district courts' prompt disposition plans) and therefore many court decisions under those Rules have precedential value when construing provisions of the Plan. *United States* v. *Bowman*, 493 F.2d 594, 595 n.3 (2d Cir. 1974).

2 Rule 4 of the Plan provides:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

tried (other than a sealed indictment), whichever is earliest." Rule 4 further provides that if the Government is not ready within the six-month period, the indictment shall be dismissed with prejudice, unless the period has been tolled under one or more of the exceptions listed in Rule 5 or the Government's neglect is found to have been excusable.

Furey was arraigned on the afternoon of his arrest, December 19, 1972, before Magistrate Brisach on a complaint, signed by a special agent of the United States Bureau of Customs, charging that Furey had possessed with intent to distribute 1¼ pounds of opium in violation of 18 U.S.C. § 841(a)(1). He was released from custody a few days later upon the giving of a $5,000 surety bond.

It soon became clear that Furey, who was born on April 23, 1955, had not yet become 18 years of age and was therefore a juvenile within the meaning of 18 U.S.C. § 5031. Because of his juvenile status, there were two ways in which the case against Furey could have proceeded: (1) as an adult offender, which would have required an express direction by the Attorney General; or (2) as a juvenile delinquent, which required the appellant's consent. 18 U.S.C. § 5032. The determination of the alternative to be followed here was submitted to the Attorney General, although it is not clear when this was done. In any event, sometime in February or early March, 1973, the determination was made that the Attorney General would not direct criminal proceedings against Furey if he would consent to the juvenile delinquency procedure.

In March and April, 1973, there was apparently some discussion between counsel from which the prosecutor got the impression that Furey would not only consent to delinquency proceedings, but also would not contest the adjudication. Little else, however, transpired until June 18, 1973,

when the Assistant United States Attorney sent a letter to defense counsel informing him that, in accordance with 18 U.S.C. § 5033, the matter would be heard to obtain consent to proceed against the defendant as a juvenile delinquent on June 21, 1973, before Hon. Orrin G. Judd, United States District Judge for the Eastern District. The hearing took place as scheduled and the information charging juvenile delinquency was filed with the defendant's consent appended to it. Although under the Eastern District's Local Rules, Judge Judd, having supervised the taking of the consent, would normally have been assigned the case, it was, for some unexplained reason, randomly assigned to Judge Dooling. The precise assignment date is not known but it was sometime before September 1, 1973.

Nothing further took place until October, 1973 at which time the Assistant made inquiry of Judge Dooling as to the status of the matter and an initial conference was scheduled for December 13th. At that conference defense counsel announced his intention to move for dismissal on the ground that the Government had not complied with Rule 4 of the Eastern District's Plan. The Assistant advised that the Government was ready to go to trial, although a formal notice of readiness was not filed until December 21, 1973. On the day following the conference, the defendant filed his motion to dismiss, which Judge Dooling, after a hearing, denied in a memorandum and order dated December 27, 1973. Despite the fact that almost a year had elapsed between the defendant's arrest and the Government's expression of readiness for trial, Judge Dooling found no violation of Rule 4 of the Plan:

> No purposive delay by the Government has occurred. Inadvertence and administrative confusion compounded by clerical omissions on the parts of the Assistant

> United States Attorney, the undersigned and the Clerk's office have caused the delay . . . .
>
> The case is one in which, if it is within Rule 4 of the Plan, falls into the class of cases in which the six months limitation period would be extended because the delay has been occasioned by exceptional circumstances within the idea of Rule 5(h).
>
> However, June 21st, 1973, is the base-line date for this case. On that date for the first time the defendant was charged as a juvenile delinquent. The notice of readiness was filed on December 21, 1973, and on December 13, 1973, the Government unequivocally advised defendant and the Court that it was ready and willing and anxious to proceed . . . . The case will, therefore, be heard on January 2, 1974, on the basis that the Government was ready within six months of June 21, 1973 . . . .

Judge Dooling did not consider the issue of whether the Government's conduct here, assuming it constituted "neglect," should be characterized as "excusable neglect."

On January 2, 1974, the date set for the juvenile delinquency hearing, Furey petitioned this court for a writ of mandamus and moved for a stay of prosecution. Circuit Judge Henry J. Friendly denied the motion for the stay and accordingly dismissed the petition for mandamus as moot. *Furey* v. *Dooling*, Docket No. 74-1004 (2d Cir. Jan. 2, 1974).

As a matter of policy we see no reason why juvenile delinquency proceedings should be excluded from the coverage of the Plan. The same policies which precipitated the enactment of rules providing for the prompt disposition of criminal proceedings are applicable whether the person charged is an adult or a juvenile. Thus, the deterrence

afforded by prompt disposition,[3] the potential prejudice to any defense arising from delay as well as the disruption and anxiety created by a criminal charge,[4] are present whether the accused be a juvenile or an adult.

It is, of course, true that the Plan is directed toward the "Prompt Disposition of *Criminal* Cases," and we have recently observed that "[p]roceedings under the [Federal Juvenile Delinquency] Act are plainly different from the ordinary criminal prosecution," *United States* v. *Torres*, —— F.2d at ——, —— slip op. 4199, 4206-07 (2d Cir. June 14, 1974). It has also been recognized, however, that delinquency proceedings are not devoid of criminal aspects and the courts have carefully shunned the approach of determining the rights of juveniles by characterizing delinquency proceedings as either "criminal" or "civil." See *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 541 (1971) (plurality opinion). In view of the salutary purposes of the Plan, which are in no way inhibitory of the goals of the juvenile court but are rather compatible with its protec-

3 The Advisory Committee on the Rules in their notes in connection with Fed. R. Crim. P. 50(b) recognized that the public has a substantial interest in the prompt disposition of criminal matters, since "it is the certain and prompt imposition of a criminal sanction rather than its severity that has a significant deterring effect upon potential criminal conduct." See also *United States* v. *Rollins (II)*, 487 F.2d 409, 413 (2d Cir. 1973).

4 In *United States* v. *Marion*, 404 U.S. 307, 320 (1971), the Supreme Court observed:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

tive and paternalistic procedure (*McKeiver* v. *Pennsylvania, supra,* 403 U.S. at 545), we are persuaded that juvenile delinquency adjudications were not intended to be beyond the scope of the Plan. See also *In re Gault,* 387 U.S. 1, 17-18 & n.23 (1967).

Having concluded that the Plan is applicable here, we cannot agree that the baseline date is June 21, 1973, the date the information and appellant's consent were filed. Rule 4 of the Plan expressly provides that the six-month period runs "from the date of the arrest . . . or the filing . . . of a formal charge upon which the defendant is to be tried . . . *whichever is earliest.*" (emphasis added). Here, the appellant was arrested on December 19, 1972 for the same offense that served as the basis for the delinquency adjudication.

On June 21st, the nature of the proceeding against Furey did change from that of a felony prosecution to that of a delinquency adjudication, but this does not justify ignoring the plain language of Rule 4, especially since the Government's proof in the delinquency proceeding was no different than that which would have been required in the felony prosecution had that been pursued. It is no answer to suggest that Furey by consenting to juvenile treatment avoided the severe penalties of a felony conviction. Making a juvenile's right to speedy adjudication depend upon his refusing to consent would introduce into the juvenile court process a factor which could be nothing [illegible]ounter-productive. Counsel, faced with factual situations like that presented here (six months having elapsed prior to the consent hearing), might well feel bound to balance the risks of a felony conviction against the possibility of having the charges dismissed for failure to comply with the Plan. This would introduce a factor which is contrary to "the strong public interest in *encouraging* resort to the procedures for handling and treatment of juvenile delinquents established by

within the ordinary meaning of that term. Cf. *United States* v. *Rollins (II)*, 487 F.2d 409, 412 (2d Cir. 1973). At least after the Attorney General's determination in February or early March, all the prosecutor had to do was schedule the consent hearing to determine whether the case would proceed as a delinquency adjudication or as a felony prosecution. Due diligence would have produced the appellant so far as the record before us would indicate.

The Government has also urged that the period prior to consent in juvenile delinquency proceedings should always be considered to constitute "exceptional circumstances" within the meaning of Rule 5(h).[7] Admittedly, because of the necessity of obtaining (1) the direction of the Attorney General and (2) the juvenile's consent, such proceedings do present distinct problems, and the district courts, upon further reflection, may find it advisable to amend their prompt disposition plans to incorporate a specific provision governing juvenile proceedings. However, as the Plan exists, we cannot accept the Government's construction, which would again have the effect of having the six-month period commence to run on the day the information and consent are filed rather than the date of arrest, which is the clear intent of the Plan. If there is anything that Rule 5(h) was not intended to cover, it is the blanket type of exclusion proposed by the Government here. As Chief Judge Kaufman pointed out in *United States* v. *Rollins (I)*, 475 F.2d 1108, 1110 (2d Cir. 1973), "'Other periods of delay occasioned by exceptional circumstances,' was intended to cover extraordinary occasions that the drafters could not envision . . . ." See also *United States* v. *Favaloro*, 493 F.2d 623, 625 (2d Cir. 1974). Juvenile delinquency proceedings can hardly be so characterized.

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7 "Other period of delay occasioned by exceptional circumstances" are excluded from the six-month period by Rule 5(h).

Neither can we agree with the district judge that the delay in *this case* was due to "exceptional circumstances." The determination of the Attorney General came in a reasonably timely fashion. Less than four months had elapsed since the arrest and, as the district court recognized, the case presented no particular trial problems. Apparently there was an administrative mix-up in the Clerk's Office regarding the assignment of the case and Judge Dooling did not call the case up for action, but we fail to see why these facts should be characterized as "exceptional circumstances" so as to relieve the Government of its obligation of timely filing its notice of readiness. The Eastern District's prosecutors were well aware that the better practice was to file the notice of readiness with the Clerk's Office and not directly with the assigned judge. *United States* v. *Pierro*, 478 F.2d 386, 389 (2d Cir. May 9, 1973). Nor have we been presented with any unusual conditions in the United States Attorney's Office which rise to the level of "exceptional circumstances." See *United States* v. *Favaloro, supra*. The prosecutor here, of course, not only was under the impression that Furey would consent to delinquency proceedings but also that the proceedings would not be contested. This misunderstanding, however, does not bring the case within Rule 5(h). Unlike adult prosecutions in which plea negotiations may in some instances constitute exceptional circumstances, see *United States* v. *Scafo*, 470 F.2d 748 (2d Cir. 1972), juvenile proceedings are of such nature that there is nothing about which to negotiate. 18 U.S.C. §§ 5031 & 5034 do not distinguish underlying offenses and there is no claim here that the Attorney General's determination was conditional on the juvenile proceedings being uncontested. Moreover, whether the proceeding is contested or not, we are advised that in the Eastern District an ev-

identiary hearing is held to insure that the juvenile did in fact violate the law.

Having found that the Plan is applicable and that none of the Rule 5 exceptions urged are pertinent, there still remains the possibility that the neglect of the Government here was "excusable" under Rule 4 of the Plan. See *United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974). This was a question not considered below and therefore no findings were made on the point. We do not find the record before us is sufficiently developed to make the determination here. We are not aware that the application of the Plan to juvenile proceedings has ever been decided before this appeal. The understanding of the prosecutor of the Plan's applicability at the time of the procedures employed below would possibly bring the case within *United States* v. *Bowman, supra.*

We therefore vacate the judgment of the district court and remand for further proceedings on the appellant's motion to dismiss. The district court, after considering such additional evidence as may be relevant, should make findings of fact on the issue of excusable neglect. If it determines that the motion should be denied, it shall enter a new final judgment, thereby preserving Furey's right to further appellate review. In the event it determines that the motion should be granted, the charges against Furey should be dismissed.

Judgment vacated and case demanded.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,		
-against-	:	73 CR 608
	:	MEMORANDUM
ANDREW FUREY,		and
Defendant.	:	ORDER

Appearances:

RAYMOND J. DEARIE, Esq. (DAVID G. TRAGER, Esq. United States Attorney, of Counsel) for the Government

RICHARD C. MOONEY, Esq. (Messrs. FUREY and MOONEY, of Counsel) for the defendant.

DOOLING, D.J.

In addition to the findings made in the Memorandum and Order of December 27, 1973, the further hearing warrants the following findings:

After the arrest on December 19, 1972, the case was assigned to Assistant United States Attorney David A. DePetris. It was soon apparent that defendant was a juvenile, and, in consequence, after preliminary discussions with defense counsel and the defendant's release on bail, as well as discussions leading to the disposition of the case as to his brother without indictment, Mr. DePetris discussed the case with the Chief of

the Criminal Division, Edward Boyd, two or three weeks after the arrest. Then, early in January, Mr. DePetris communicated with the Attorney General's office, and, after one follow-up telephone call, was advised in late February or early March that the Attorney General would not direct procedure by indictment, and that, therefore, the case would be proceeded with as a juvenile case if the defendant gave the required consent. Inconclusive talks between Mr. DePetris and defense counsel followed, the content of which is not genuinely recoverable. Finally, on June 18, 1973, the notice of the hearing on the consent procedure was sent out and the consent hearing took place, on June 21, 1973; it resulted in the defendant's assenting to juvenile procedure, as well he might.

It cannot be said that there was any particular circumstance excusing delay, other than that to be discussed later, during the time from December 19, 1972 until December 21, 1973 when a formal notice of readiness was filed. The only other date of significance would be a date in October or November (over six months after the Attorney General declined indictment) at which Mr. DePetris drew the attention of the court to the case and was given a date for initial

conference. There was no concurrence of circumstances that could result in characterizing the delay involved as excusable unless the circumstances now adverted to can be so regarded.

Mr. DePetris was fairly clear in his recollection that at all of the times when the present case was pending, the "Notice of Readiness" was an instrument in regular use in the United States Attorney's office, and one that he customarily used, although he also treated an announcement of readiness and arranging for a trial date at the time of arraignment as an equivalently clear-cut notice to court and opposing counsel that the Government was in fact ready for trial and seeking a trial setting. His recollection is that at some time, he would judge in March, of 1973 there was a meeting in the United States Attorney's office in consequence of the handing down of a decision in the Court of Appeals on the question of Notice of Readiness, and that the Assistants were then advised to check their cases for the filing of a Notice of Readiness. Mr. DePetris would connect this meeting with the handing down of either United States v. Rollins, 475 F2d 1108, decided March 13, 1973, or the

definitive case on the need for the Notice of Readiness, United States v. Pierro, 478 F.2d 386, which was decided on May 9, 1973. While Rollins is not wholly expressive, it reasonably makes clear the Court's assumption that it is the failure of the Government to file a timely Notice of Readiness that occasions the usual defense motion to dismiss (see 475 F.2d at 1111-1112).

Nevertheless, no Notice of Readiness was filed in the present case when it was formally initiated after obtaining the consent on June 21, 1973. The state of Mr. DePetris's mind is of course a question of fact and only his evidence can be available. He said with entirely credible straightforwardness that he could not and did not contend that he considered filing a Notice of Readiness and then concluded that he did not need to do so because juvenile cases were in a class by themselves and not within the Rule. Mr. DePetris, rather, says that the case was a juvenile case, that such cases are "different," and that he simply did not advert to the Notice of Readiness requirement in connection with the present juvenile case.

Cases proceeded with as juvenile cases are surprisingly few in number in the Court. There is no statistical

classification for them either in the United States Attorney's office, in the Probation Office or in the Clerk's office. In all three offices they are treated as criminal cases and have criminal docket numbers and are assigned as criminal cases usually are assigned, except that they all go to the Miscellaneous Judge on their first appearance in Court for the consent proceeding rather than going immediately under the random selection system to an assigned judge. Hence it is rather difficult to track the cases down. At the court's suggestion Mr. DePetris checked through the criminal files on a case-by-case basis and reported that the number of juvenile cases located was indeed small, 10 in 1973 and 4 in 1974. In only one of these cases was a Notice of Readiness filed and that was a case in which the filing occurred after the readiness matter came up in the present case.

Defense counsel object that this sort of check on practice is not fair to defense counsel, who really have no very practical means of checking the United States Attorney's work, and who did not have an opportunity to oversee it. Defense counsel were supplied with copies of the docket

sheets of the cases located by Mr. DePetris's survey but counsel argues that they disclose little and do not cure the defect in survey method. All this is true and goes heavily to the weight of the very informal survey, but it does show at least, whether or not the survey was complete and picked up all the juvenile cases, that in the period in question no notice of readiness was filed in thirteen juvenile cases.

Defense counsel note that in no juvenile case was there delay nearly as great as in the present case. The longest delay between docketing* and disposition was 147 days and defense counsel point out that the average time lapse appears to be in the order of 40 days.

While, therefore, it is not impossible to infer that the failure to fit the case into the Notice of Readiness framework was understandable, it cannot be said in all of the circumstances that the delay in moving the case was excusable, applying the test of United States v. Bowman, 2d Cir. 1974, 493 F.2d, 594, 597-598.

The Government argues that Rule 50(b) does not

*As counsel notes, docketing date is not arrest date, but, even so, from docketing to disposition here was a little over six months.

authorize the inclusion in Plans for Achieving Prompt Disposition of a provision for dismissal with prejudice and that the Model Plan made available by the Judicial Conference contained a contrary provision - that non-compliance with the Plan schedules should not require dismissal, but should not prevent dismissal for unnecessary delay under Rule 48(b). It is suggested that otherwise the Plan as here applied would be invalid as beyond the judicial rule-making power. But rejection of these contentions is the major premise of the many decisions enforcing the rules of the Plan and the earlier prompt disposition rules of the Court of Appeals.

It follows that the judgment having been vacated the defendant's motion to dismiss under the Rule is now granted and the information is dismissed.

Brooklyn, New York

August 26, 1974.

U. S. D. J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 7th day of November 19 74 he served ~~a copy~~ two copies of the within

Government's Appendix

by placing the same in a properly postpaid franked envelope addressed to:

Furey & Mooney, Esqs.
600 Front Street
Hempstead, N. Y. 11550

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
7th day of November 19 74

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501985
Qualified in Kings County
Commission Expires March 30, 197[illegible]